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August 16, 2004

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Federal Communications Commission
Office of the Secretary
EXPARTE

Via Overnight Delivery and Email

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: AT&T Petition for Declaratory Ruling Regarding "Enhanced"
Prepaid Card Services, WC Docket No. 03-133**

Dear Chairman Powell:

I am writing this letter on behalf of WilTel Communications, LLC after reviewing recent press reports that a pending decision in the above-referenced docket is being delayed. I hope these reports are wrong, as failure to address AT&T's Petition and clarify Commission rules is causing severe disruption in the interexchange market, and is undermining intercarrier compensation and universal service policies. A decision here is crucial and already long overdue.

WilTel, although not a name brand from a consumer standpoint, is one of the premier providers of domestic and international voice services in the United States, transporting several billion minutes of traffic per month. WilTel provides underlying wholesale services used by many of the largest retail voice businesses in this country. WilTel owns a fully-scaled state-of-the-art national network operated by highly-skilled employees. Moreover, WilTel prides itself on its business ethics. We work hard to comply fully with the Commission's rules, to compete on a level playing field with our rivals, and to let the market act as the arbiter of our competitive fate.

FCC Inaction is Seriously Distorting the Voice Services Market --
Justice Delayed is Justice Denied

Put simply, the FCC's reluctance to clarify and enforce its rules regarding so-called "enhanced" voice services is forcing voice service providers to wager their companies' futures in a game of chance with unknown odds. At stake are regulatory expenses -- access charges and USF payments -- that can comprise over 80% of an interexchange company's operating costs. A company's ability to control such costs is the key determinant of the prices it can charge, and of its competitive success. For example, a firm that does not pay such charges on the terminating end of a voice call has a cost structure that is 40% lower than a firm that does -- in an industry where margins are already razor thin.

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Today the FCC is unfairly forcing companies to choose between two equally unattractive and dangerous paths. Option One is to take on significant regulatory and business risk -- aggressively "self-interpreting" the Commission's rules to mean that a company's particular variety of voice service is "enhanced" and is therefore exempt from the access and USF charges incurred by competitors. This option substantially lowers a company's current operating costs and allows it to lower prices today. But this path also puts the company at risk of potentially huge financial liabilities if the Commission later rejects its legal position.

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Option Two is equally problematic. Voice service providers can abstain from taking on regulatory risk, and pay access and USF charges. But this choice means that such companies are burdened with a substantially higher cost structure that prevents them from meeting low market prices set by the legally-aggressive "self-interpreters". Under this option a firm does not risk large liability in the future, but this is small comfort as it loses business today.

The Commission's inaction is impacting every company in the market. Even traditionally "conservative" firms like AT&T are being driven to pursue ever more aggressive strategies aimed at access and USF avoidance in order to compete with smaller firms that already are obtaining substantial market shares with their own avoidance strategies. All companies face inevitable pressure to "self-interpret" the law in a manner at least as aggressive as their rivals or face competitive extinction. Thus, financial success in voice services is now largely driven by tolerance for "regulatory risk," rather than by relative efficiency and creative drive. Some firms take their chances and do not pay full access or universal service charges; others wait on FCC guidance and pay in the meantime -- even though they offer virtually the same services using the same access infrastructure.

FCC Inaction Places the Commission's Policy Goals at Risk

FCC inaction does not just harm individual voice service providers. It also jeopardizes the Commission's goals of universal service and a healthy, vibrantly competitive telecom market. For example, market-clearing prices demonstrate that some companies are setting rates to end users below access and USF cost, reflecting their non-payment of these expenses. ^{1/} But the practical result is that such firms would not necessarily have the funds to make retroactive payments later even if they were ordered to do so.

The longer the FCC takes to act, the more it raises the business stakes for the public and the nation's telecom industry, including the universal service fund and all telecom providers. While the Commission delays, the potential liability of access and USF avoiders grows ever larger, increasing the risk that such companies could go bankrupt (or at least suffer serious financial distress) if they lose their regulatory bet. ^{2/} They cannot go back and collect the fees due to ILECs and the USF from end users after the fact, and they probably cannot raise prices

^{1/} See WiTel Ex Parte Letter at 4 (July 2, 2004).

^{2/} For example, AT&T has stated that its potential liability in connection with just its "enhanced prepaid card" service already was as much as \$355 million as of this past May, and presumably is still rising. The Commission faced a similar issue with regard to retroactive enforcement of its access rules when it found that AT&T was violating the law by not paying access on its "Phone-to-Phone" service. But such large potential liabilities are not a reason simply to delay decisions. That is picking winners and losers, favoring those who have taken on risk through aggressive "self-interpretation" of the rules over those more conservative firms who wait for Commission action before acting.

going forward. Yet it would be unfair to excuse these firms from paying the penalty for their own aggressive legal positions, not least because they would have benefited at the expense of firms who lost business by paying required charges rather than assuming undue regulatory risk.

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Eventually, at some point, the Commission will have to decide when and where access charges and USF fees apply. Delay simply means that some firms will have guessed wrong and some will have guessed right in a regulatory game of chance. Such games put jobs, investments, and the nation's telecommunications infrastructure at unnecessary risk. They are patently discriminatory -- favoring "lucky guessers", and subvert the Commission's statutory mandate to ensure non-discriminatory rates. They jeopardize the universal service fund and the policy mandates it supports.

In short, the market is crying out for regulatory certainty and non-discrimination. The Commission should respect these two core values, make the law clear, and enforce it equally.

Ending the Game of Chance Is Long Overdue and is Easily Accomplished

The Commission can end these market problems by issuing an order fully answering the questions presented by AT&T over a year ago. AT&T argues it is providing an information service when it "enhances" its prepaid calling card service, and that when an information service and a telecommunications service are bundled together, universal service charges do not apply. AT&T also argues that due to the location of the site where the information is provided, it need not pay higher intrastate access charges.

If AT&T is obeying the law in this case, the FCC owes it to the rest of the industry to say so and explain why. Other IXC's then can and will readily implement the AT&T approach so they too can cut operating costs as much as 80%. 3/ Sprint only half-jokingly states it could easily program its switches to provide a caller with the current "temperature in downtown Jakarta" before completing a call, and would do so if injecting such an "enhancement" eliminates USF contribution obligations. 4/ Sprint is absolutely correct that all IXC's could come up with such "enhancements" to match AT&T. Indeed, all IXC's could join AT&T in getting customers to write letters applauding the lower, long distance prices that such cost avoidance would permit.

Conversely, if AT&T is unlawfully avoiding access and universal service expenses, the FCC owes it to the market to enforce its rules now. Each day of delay causes irreparable damage to law-abiding companies in the form of lost sales and revenues, and each day further jeopardizes the universal service fund and other public policy goals.

This matter has been fully briefed by both AT&T and other parties. It should be easy for the Commission to interpret its existing rules, based on existing precedent.

In doing so -- in order to prevent additional petitions and bring the gaming and scheming to an end -- it is imperative the Commission generically address the bundling of enhanced or information services with telecommunications services, and define whether and how such

3/ BellSouth suggests that AT&T also may not be paying its Telephone Relay Service obligations in these circumstances. See BellSouth Ex Parte Letter, at 1 (Aug. 5, 2004). While access and universal service are much more competitively significant cost components, even "self-interpretation" of the TRS rules could have market impact given tiny current margins.

4/ See Sprint Ex Parte Letter, at 2 (Aug. 2, 2004).

services are subject to access and USF charges. AT&T is but the tip of an "enhanced services iceberg". Numerous other providers are today avoiding payment of access and universal service charges based upon their own claims to be "enhancing" a call.

If adding a peripheral "enhancement" to a service that clearly qualifies as telecommunications service -- such as standard PSTN-to-PSTN voice long-distance service -- does not excuse universal service or access obligations, then companies will have little incentive to "invent" further enhancements in an effort to avoid access and USF fees, and the Commission will not be called upon to referee the disputes which are the inevitable outcome of such creativity. If this is the Commission's view, it has only to firmly reiterate that a telecommunications service does not cease to exist and become converted to an information service simply because some enhancement or information service capability is bundled with it.^{5/} Conversely, if bundling an enhancement with a voice service modifies USF or access liability, the Commission must simply specify precisely what the modification is and what "enhancements" qualify for modified treatment.

For over a year WilTel patiently but persistently asked the Commission for clarity and enforcement of its existing rules concerning two straightforward issues: (1) what constitutes an "enhanced" or "information" service, and (2) what, if any, access charge and USF payments are required when such "services" are bundled with basic telecommunications. Requests for simple explanation of existing rules should not take this long.

We and others in our industry have devoted our time, energy and billions of dollars in building a state-of-the-art system of telecommunications. We deserve a timely, "state-of-the-art" system of regulation that -- at a minimum -- is capable of stating, interpreting and enforcing its existing rules. The Commission must act now, fulfilling its statutory responsibility to ensure that companies are rewarded for their efficiency and their ability to meet customer needs -- not for scheming and "lucking out" in a regulatory game of chance.

Sincerely,



Blaine Gilles
Senior Vice President
Voice Services and Strategic Markets
WilTel Communications, LLC

^{5/} This is consistent with Commission precedent that universal service charges are due on a bundled package of services if it is not possible to identify the price of the enhancement bundled with the telecommunications service. *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418 (2001); see also *Federal-State Joint Board on Universal Service*, Fourth Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 5318, ¶ 282 (1997).

cc via Email to:

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